to presume that a person who had obtained a gift or contract to his own advantage and the detriment of another by way of personal advice or persuasion has availed himself of the natural influence which his position gave him; and in casting upon him the burden of exculpation the law is only assuming that he has done so. But it is a very different thing to presume, without a particle of proof, that a person so situated has abused his position by the exercise of dominion or the assertion of adverse control."

Many authorities considering the distinction pointed out by Lord PENZANCE as the vital one hold that the burden never shifts from the contestant, but that proof of a confidential relation is a circumstance of suspicion requiring clear and decisive evidence of the testator's knowledge and assent to the contents of the will. Among these are the New York courts. *Cudney* v. *Cudney*, 68 N. Y. 148; *Matter of Martin*, 98 N. Y. 193; and to the same effect are *Yardley* v. *Cuthbertson*, 108 Pa. St. 395; *Armor's Estate*, 154 Pa. St. 517; *Barry* v. *Butlin*, 1 Curt. 637; *McCommon* v. *McCommon*, 151 Ill. 428; *Parfitt* v. *Lawless, supra; Downey* v. *Murphy*, 1 Dev. & B. (N. C.) 82; *Meek* v. *Perry*, 36 Miss. 190.

But it is submitted that the better rule is that laid down in *Bancrotf* v. *Otis, supra* which is supported by the weight of authority in this country, to the effect that before testamentary dispositions can be presumed to have been unduly influenced, something in addition to the mere existence of a confidential relation must be shown; as that the proponent initiated the preparation of the instrument, wrote it himself, gave directions as to its contents to a draughtsman, or selected the witnesses to be present and the like. *St. Leger's Will*, 34 Conn. 434; *Henry* v. *Hall*, 106 Ala. 84; *In re Brook's Estate*, 54 Cal. 471; *Goodbar* v. *Lidiky*, 136 Ind. 1; *Denning* v. *Butcher*, 91 Ia. 425; *Sechrest* v. *Edwards*, 61 Ky. 163; *McMaster* v. *Scriven*, 85 Wis. 162; *Bennett* v. *Bennett*, 50 N. J. Eq. 439; *Watterson* v. *Watterson*, 1 Head 1; *Paxton* v. *Allison*, 7 Humph. 332; and see the following New York cases, *In re Welsh*, 1 Redf. 238; *Matter of Smith*, 95 N. Y. 516. Such is the rule laid down in the Iowa case. P. B.

SETTING ASIDE DEFAULT JUDGMENTS.—An extremely interesting case, decided by a divided court, two to one, has recently been handed down by the Supreme Court of Montana. In *Lovell* v. *Willis* (1913), 129 Pac. 1052, the plaintiff sued for the value of services rendered. The defendant was regularly served, but defaulted, and upon application the clerk by virtue of statute entered judgment for the amount specified in the complaint. Two days later the defendant moved to set aside the default and vacate the judgment on the ground that he had failed to appear "by reason of his mistake, inadvertance, and excusable neglect." The motion was accompanied by an affidavit setting out the facts upon which he would rely for his defence if allowed to answer. It appeared therefrom that when served, after reading a copy of the complaint, defendant placed it in a valise and then forgot about it, as he was traveling and "his attention was so absorbed by his devotion to important domestic and business duties, besides matters of public interest,"

that the valise was not unpacked until after his default had been entered. The affidavit showed no facts in this regard—merely the defendants' own conclusion that they were important. The trial court set aside the default, which on appeal was held error. HOLLOWAY, J., filed a dissenting opinion.

Seldom indeed does a case bring forth such apparently conflicting legal principles, so that the application of one would lead to a totally different result than would the application of the other—and each seeming equally relevant and proper to the case in hand. The majority opinion proceeds on a double ground, first, that mere forgetfulness is not a sufficient excuse to warrant opening a default, *Scilley* v. *Babcock,* 39 Mont. 536; *Nauer* v. *Benham,* 45 Minn. 252; *Shay* v. *Clock Co.,* 111 Cal. 549; *Athens M'fg. Co.* v. *Myers,* 98 Ga. 396; *Harmes* v. *Jacobs,* 160 Ill. 589; and second, that the affidavit should have set out the facts showing that the defendant's business was so pressing that an "average man would under similar circumstances have been likely to forget his other important interests," not merely the conclusions from such facts. The dissenting opinion of HOLLOWAY, J. is likewise based on a double ground, first, that in setting aside a default the motion is addressed to the sound discretion of the trial court on the particular facts of the case, and generally it may be said that its action on the matter will not be disturbed by the appellate court, unless it is evident that there has been an abuse of such discretion, *New York* v. *Smith,* 138 N. Y. 676; *Wheeler M'fg. Co.* v. *Monahan,* 63 Wis. 194; *Welch* v. *Mastin,* 98 Mo. App. 273; *Klepfer* v. *Keokuk,* 126 Ia. 592; *White* v. *Gurney,* 92 Minn. 271; *Walton* v. *Hartman,* 38 Wash. 34; *Bridges* v. *Blakeman,* 108 Ga. 801; *Hartford Ins. Co.* v. *Rossiter,* 196 Ill. 277; *Hardware Co.* v. *Mining Co.,* 11 S. D. 376. The second ground of his dissent it that the section of the Code of Montana in providing that the court in its discretion might relieve a party from a judgment taken against him through his surprise, mistake, inadvertence or excusable neglect, was a remedial provision, and as such to be liberally construed so as to effect the objects of its enactment—which Judge HALLOWAY considered to be "to further the administration of justice, so that the very right upon the merits may be determined, and to that end grant relief from excusable neglect in cases where diligence is shown in applying for the relief sought, provided the opposite party be not deprived of any advantage to which he may properly be entitled," *Greene* v. *Montana Brewing Co.,* 32 Mont. 102; *Melde* v. *Reynolds,* 129 Cal. 308; *Griswold Oil Co.* v. *Lee,* 1 S. D. 531, 36 Am. St. Rep. 761. It will be noted that this reason goes directly to the first ground of the majority opinion, and is apparently well taken, for the prevailing opinion of the court would seem to lose sight of the fact that the provision of the Code relied upon by the defendant was a remedial statute. Finally the dissenting opinion does not consider it necessary that the defendant should show the facts upon which he claims to fall within one of the provisions of the Code above noted. However the authorities hold that in a motion for setting aside a judgment by default it is insufficient to allege in the mere words of the statute that the applicant was prevented from defending through his "excusable neglect" etc., but the facts relied on as excusing the neglect must be fully set forth. *Shearman*

v. *Jorgenson*, 106 Cal. 483; *Combs* v. *Bentley*, 19 Ky. L. Rep. 505; *Long* v. *Ruch*, 148 Ind. 74; *Kirkham* v. *Gibson*, 50 Neb. 23.

The power to set aside, vacate, modify or annul a judgment is one inherent in all courts of general jurisdiction, and is not dependent upon, or derived from statutes, *Bradley* v. *Slater*, 58 Neb. 554; *Manguno* v. *Clymonts*. 19 Oh. Cir. Ct. R. 237. This right however only extends during the term at which judgment is rendered, for after its expiration courts lose control of their judgments, *Bronson* v. *Schulten*, 104 U. S. 410; *McChesney* v. *Chicago*, 161 Ill. 110; *Ashby* v. *Glasgow*, 7 Mo. 320; *Lattimer* v. *Ryan*, 20 Cal. 628; *Salter* v. *Hilgen*, 40 Wis. 363. However a judgment which is entirely void may be set aside by the court rendering it at a subsequent term, *Thomas* v. *American M'fg. Co.*, 47 Fed. 550, 12 L. R. A. 681; *People* v. *Temple*, 103 Cal. 447. "An application to open or vacate a judgment on the ground enumerated in the statute of "excusable neglect," must show the cause of the party's neglect of the case, and that it was excusable," BLACK, JUDGMENTS, 2 ed. § 334-345. To set aside a judgment during term time, no notice to the other party is necessary, *Desribes* v. *Wilmer*, 69 Ala. 25, 44 Am. Rep. 501; *Ramsey* v. *Rothwell*, (Mo.), 153 S. W. 792; but after the term it can not be set aside without notice to either the adverse party or his representative, *Hettrick* v. *Wilson*, 12 Oh. St. 135, 80 Am. Dec. 337. A failure to exercise reasonable diligence in moving to set aside a default is a proper ground for a refusal to set aside such default or judgment, even though it may appear that the defendant has a good defense upon the merits, *Turner* v. *Threshing Co.*, 133 N. C. 381; *Simon* v. *Hengels*, 107 Ill. App. 174; *O'Connell* v. *Friedman*, 118 Ga. 831; *Texas Fire Ins. Co.* v. *Berry*, 33 Tex. Civ. App. 228.

If the proceedings up to the time of the default are regular, a meritorious defense and a sufficiently good reason for not answering before are necessary to open a default, *Robyn* v. *Publishing Co.*, 127 Mo. 385; *Marx* v. *Valentine*, 1 Alaska, 28; *Heaton* v. *Peterson*, 6 Ind. App. 1. Also it may be stated as a general rule that a mistake as to the subject matter of the cause of action or of defense alone is no ground for opening a default, *Thacker* v. *Thacker*, 125 Ind. 489; *Williamson* v. *Cocke*, 124 N. C. 585; *Cleland* v. *Trust Co.*, 55 Neb. 13; *Coburn* v. *Currens*, 64 Ky. 242; *Vail* v. *School District*, 86 Kan. 808. Nor does a mistake as to the time or place of appearance or of trial warrant opening a default, *Eliot* v. *Shaw*, 16 Cal. 378; *Miller* v. *Burton*, 121 Ind. 224; *Foote* v. *Branch*, 42 Minn. 62; *Ganzer* v. *Shiffbauer*, 40 Neb. 633; *Elton* v. *Brettschneider*, 33 Ill. App. 355. In general it may be said that mistake or negligence of counsel, when unaccompanied by other circumstances, is no ground for opening a default, even though such counsel is insolvent and unable to respond in damages for the injury to his client, *Phillips* v. *Collier*, 87 Ga. 66; *United States* v. *Irrigation Co.*, 13 N. Mex. 386; *Moore* v. *Horner*, 146 Ind. 287; *Bergeron* v. *Savings Bank*, 62 N. H. 655; *Scrivner* v. *Malone*, 30 Tex. 774; *Schultz* v. *Meiselbar*, 144 Ill. 26; *Sanborn* v. *Manufacturing Co.*, 5 Wash. 150; *Williams* v. *Heisley*, 4 Oh. Dec. 273. But, it may possibly be held otherwise in the following cases, *Ordway* v. *Suchard*, 31 Ia. 481; *Densereau* v. *Saillant*, 22 R. I. 500; *Meacham* v. *Dud-*

ley, 6 Wend. 514; *Bradford* v. *Coit,* 77 N. C. 72; *Insurance Co.* v. *Reynolds,* 52 Vt. 405. Some of the above cases may be reconciled on the ground that the default will not be opened in any case in the absence of a meritorious defense, and the fact that the discretion of the trial court will not be interfered with unless manifestly abused.

The affidavit must not only contain what will probably prove to be a meritorious defense, but in addition must set out the mistake, surprise or excusable neglect, *Harlan* v. *Smith,* 6 Cal. 173; *Bass* v. *Smith,* 60 Ind. 40; *Edwards* v. *Watkins,* 17 Mo. 273; *Burke* v. *Pepper,* 29 Neb. 320; *Foster* v. *Martin,* 20 Tex. 119. Illness of a party or of counsel, the presence of such party being necessary for the proper conduct of the suit, if due diligence be exercised, and a meritorious defense be shown, is usually ground for opening a default, *Montgomery County* v. *Emigrant Co.,* 47 Ia. 91; *Gheer* v. *Huber,* 32 Kan. 319; *Scott* v. *Smith,* 133 Mo. 618; *Wilmarth* v. *Catfield,* 1 How. Pr. 52; *Berhns* v. *Harris,* (Tex.), 150 S. W. 495; and see, *Johnson* v. *Lindstrom,* 114 Ind. 152. Ignorance or illiteracy of the defendant is usually no ground for opening a default, *Sutton* v. *Gunn,* 86 Ga. 652; *Dean* v. *Noel,* 24 Ky. Law Rep. 969; *Moody* v. *Reichow,* 38 Wash. 303; *Abrams* v. *Insurance Co.,* 93 N. C. 60; *Heisterhagen* v. *Garland,* 10 Mo. 66. But see *Nash* v. *Cars,* 92 Ind. 216; *Henderson* v. *Lange,* 71 Minn. 468; *Pierce* v. *Cole,* 17 Tex. 259; *Spoar* v. *Spokane Turn-Verein,* 64 Wash. 208.

Four cases may be taken to illustrate the different positions of courts on the question presented in the principal case, on the point of determining what is to constitute "excusable neglect." In *Town of Carondelet* v. *Allen's Ex'rs,* 13 Mo. 556, judgment was rendered against the town by default, and it was held that the affidavit of the chairman of the trustees that the suit was instituted before he was in office, and that he himself attended to the suit as soon as he heard of it, and counsel advised that the town had a meritorious defense, did not show sufficient ground for disturbing the judgment. In *McGuire* v. *Drew,* 83 Cal. 225, the fact that the defendant was a candidate for office, and on the day of the trial was looking after the returns was held not to excuse his negligence in failing to appear or to secure counsel for the trial; and likewise in *Landa* v. *McGehee,* (Tex.), 19 S. W. 516, where the defendant was a milkman delivering milk, and could secure no one to attend to his duties during his absence. See also, *Bazal* v. *Church,* 21 N. D. 602. Finally, a case very akin to the principal one, is *Lewis* v. *Cunningham,* 10 Ariz. 158, where a sheriff permitted three months to elapse after entry of default in an action against him before moving to set aside the default, when such motion was made the day after judgment was entered for the plaintiff on an unliquidated demand; affidavits that at the time summons was served he was very busy with the criminal business of the county, and the public cares of his office, and that he was constantly absent from his office on business, and overlooked the matter until after default was entered, was held not to constitute sufficient diligence to warrant opening the default, and on appeal the holding was affirmed. This case would seem to be in direct conflict with the principal case, for in the Arizona case the defaulter was engaged in performing the duties

of a public office, and the appellate court refused to disturb the action of the trial court in overruling the motion to open the default, on the ground of not interfering with the trial court's discretion; while in the principal case, the action of the trial court is reversed upon a very slight showing of any abuse of discretion.

It is in cases like these that criticism is directed against the court in whatever direction it may act. It is placed in the horns of a dilemma in the forum of public opinion; for if it refuses to open the default it is accused of a miscarriage of justice, i. e. in deciding the case upon technicalities rather than upon merit; while on the other hand if it opens the default we hear the oft repeated cry that justice is slow, and that public policy demands a cessation of litigation. W. W. M.